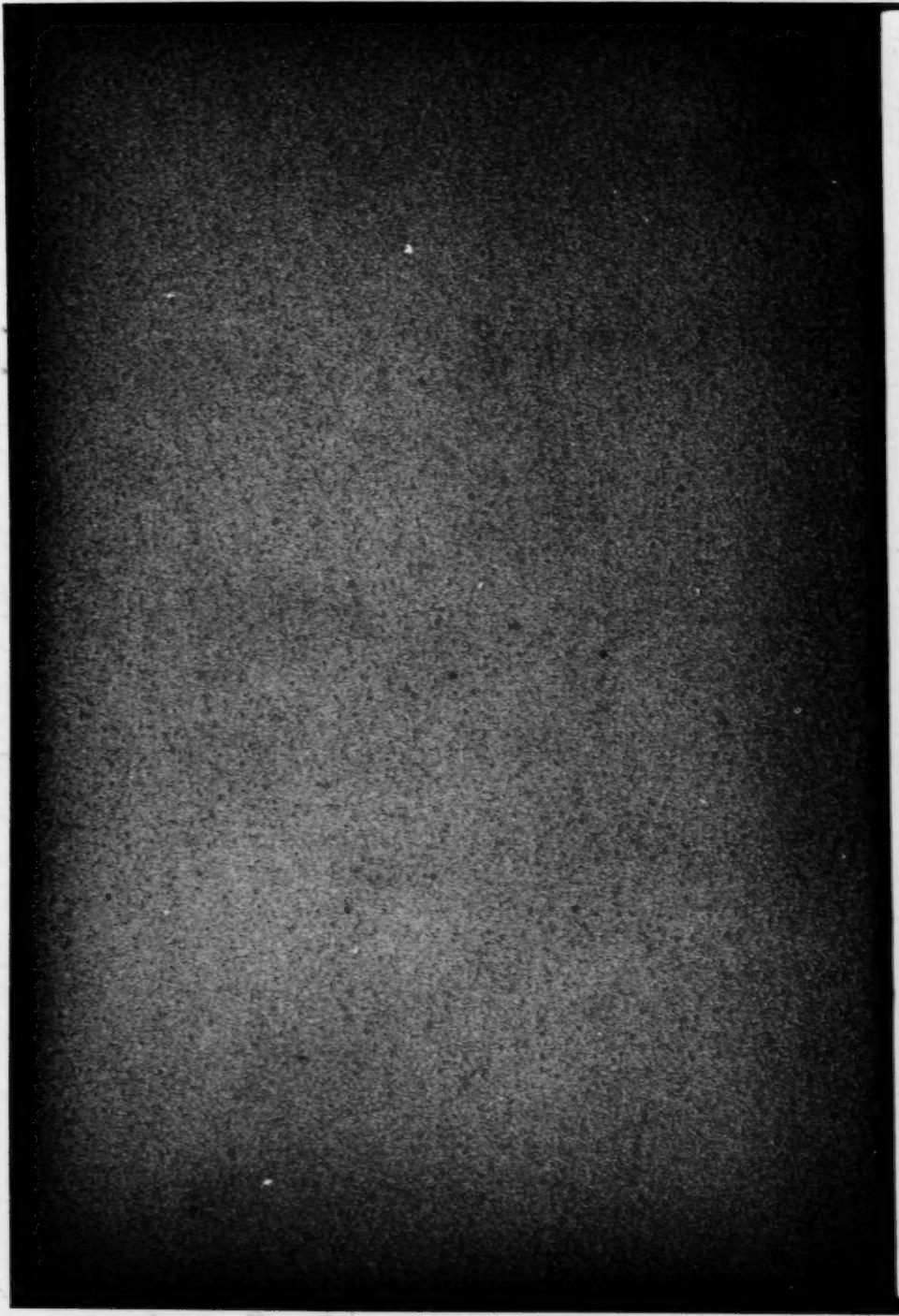

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1660

STANLEY BLACKLEDGE, Warden,
Central Prison, Raleigh, N.C. and
STATE OF NORTH CAROLINA,

Petitioners,

v.

JIMMY SETH PERRY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

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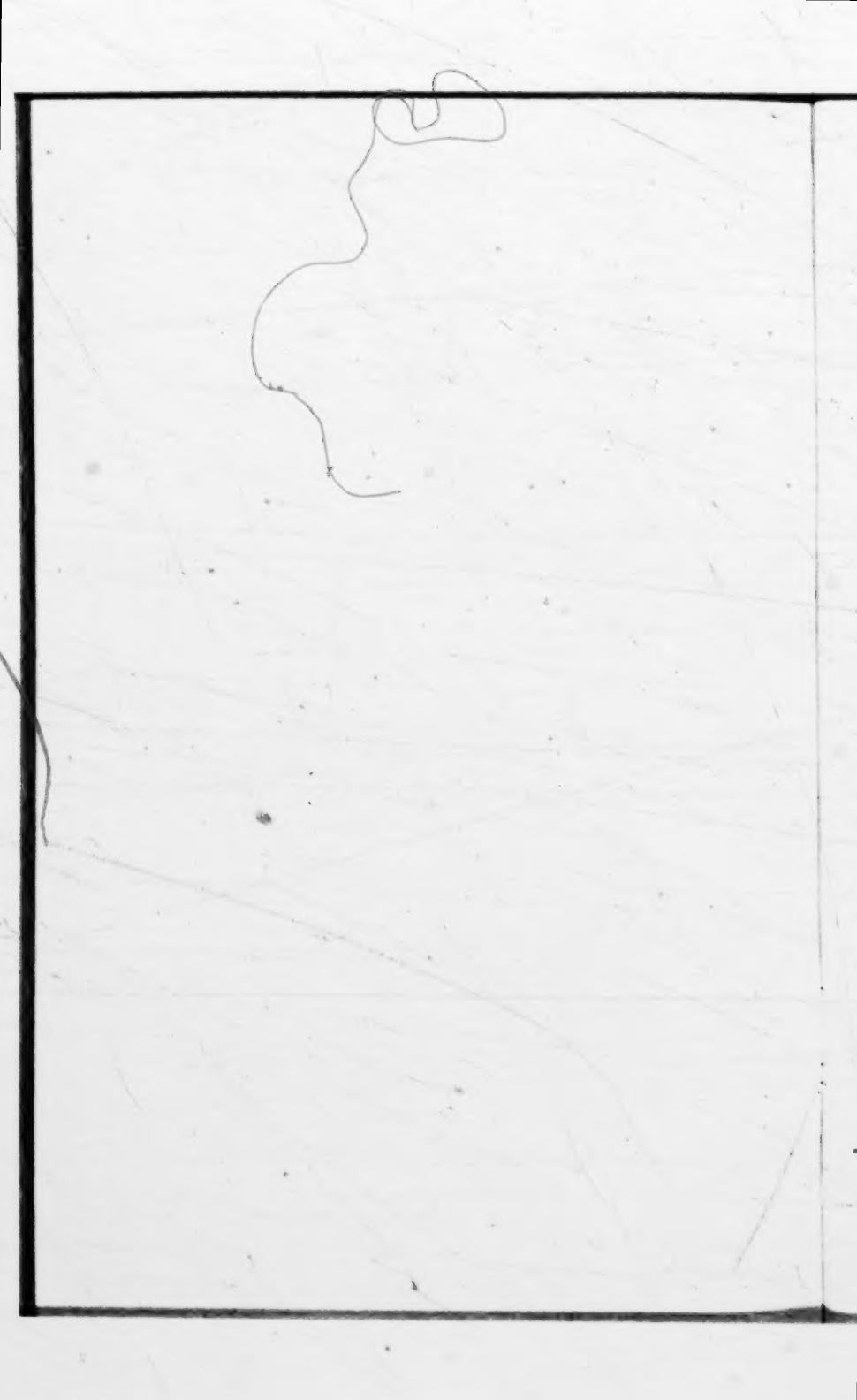

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit filed April 10, 1973, is not reported, and is printed as Appendix A in the petition for certiorari.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Are former jeopardy and an unconstitutional "chilling effect" non-jurisdictional defenses which are waived by a voluntary and intelligent plea of guilty?

II. Must a defendant be specifically advised that a guilty plea waives his right to contest double jeopardy and must this appear of record?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article V:

"No person ... shall ... be subject for the same offense to be twice put in jeopardy of life and limb."

U.S. Constitution, Article XIV:

"No State ... shall ... deprive any person of life, liberty or property, without due process of law."

N.C.G.S. 15-177:

Appeal from justice, trial de novo.—The accused may appeal from the sentence of the justice to the superior court of the county. On such appeal being prayed, the justice shall recognize both the prosecutor and the accused, and all the material witnesses, to appear at the next term of the court, in such sums as he shall think proper; and he may require the accused to give sureties for his appearance as aforesaid. In all cases of appeal, the trial shall be anew, without prejudice from the former proceedings.

N.C.G.S. 15-177.1:

Appeal from justice of the peace or inferior court; trial anew or de novo.—In all cases of appeal to the superior court in a criminal action from a justice of the peace or other inferior court, the defendant shall

be entitled to a trial anew and de novo by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon.

STATEMENT OF THE CASE

In August 1969, Jimmy Seth Perry was convicted in the District Court of Northampton County, North Carolina, on a warrant charging him with the misdemeanor of assault with a deadly weapon. He received a sentence of six months imprisonment. This was to be served after a sentence of 5 to 7 years for uttering a forged instrument which had been imposed in August of 1968 in a different court; and which sentence actually began in January 1969. Perry appealed the assault conviction to the Superior Court and received a trial *de novo*. However, during the interim between appeal and trial *de novo*, the solicitor obtained an indictment charging him with a higher and felonious degree of the crime and it was this on which he was tried rather than the warrant. In October 1969, he pleaded guilty and received 5 to 7 years to be served concurrently. The transcript of plea is Appendix B in the petition for certiorari. As the uttering sentence began January 15, 1969, and this assault sentence began on October 29, this was, in effect, an additional sentence of about 9 months and 14 days or about 3 months and 14 days over the sentence of six months given for assault in the District Court.[1]

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[1] The District Court noted that the sentence could be viewed as giving an additional term of about 17 months since under North Carolina law at that time petitioner received no credit for pretrial custody on, or custody pending appeal of his uttering conviction. This was later required as a matter of constitutional law by the Fourth Circuit as to appeal custody time, *Cole v. North Carolina*, 419 F.2d 127 (4th Cir. 1969), based on *North Carolina v. Pearce*, 395 U.S. 711 (1969); and subsequent District Court decisions in North Carolina applied this to pretrial custody, which the 4th Cir-

Petitioner, after exhausting state remedies, filed for a writ of habeas corpus which was allowed by Honorable John D. Larkins, Judge, United States District Court, Eastern District of North Carolina. The decision of Judge Larkins is attached as Appendix C [to the petition for certiorari]. He found that the indictment of petitioner for the higher offense pending trial *de novo* was double jeopardy, relying on *Wood v. Ross*, 434 F.2d 297 (4th Cir. 1970); that the first trial constituting a binding election and the second a chilling of the right to appeal; and that double jeopardy could not be waived, it going to the power to retry Perry. On appeal this was affirmed by the United States Court of Appeals for the Fourth Circuit without discussion.

ARGUMENT

I.

FORMER JEOPARDY IS A DEFENSE WHICH IS WAIVED BY A VALID PLEA OF GUILTY. THE SAME IS TRUE OF A DUE PROCESS CLAUSE VIOLATION WHICH ARISES BECAUSE OF A CHILLING EFFECT ON THE RIGHT TO TRIAL BY JURY.

In this case, Jimmy Seth Perry entered a plea of guilty in the Superior Court to assault with a deadly weapon with intent to kill resulting in serious bodily injury, a felony. This plea occurred at a trial *de novo* on the assault after Perry had first been tried and convicted in the state District Court of a misdemeanor assault encompassed by the felony charge. The United States District Court held that this entitled him to relief because it unconstitutionally burdened his right to a jury trial, and because it was double jeopardy (Pet. Cert. pp. 12-20). This was incorrect because the legal effect of the plea was

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cuit ultimately endorsed, *Ham v. North Carolina*, 471 F.2d 406 (4th Cir. 1973). He received this additional credit on his uttering charge by virtue of the order of this case, thereby advancing his sentence beginning date on the uttering conviction so as to create this 17 month interim.

to make the conviction binding upon him and to preclude a constitutional attack on the conviction unless the plea was coerced by illegality to the extent that his will was overborne, or unless the plea was entered because of incompetent advice by his counsel, *McMann v. Richardson*, 397 U.S. 759 (1970). Neither Perry nor his counsel alleged either of these in seeking his release by way of *habeas corpus*, but instead alleged independent constitutional violations without attacking the plea itself.

A violation of the right against double jeopardy is not excepted from the *McMann* holding. When such a violation occurs, it can be used by an accused as a basis for "a plea of discharge or release that gives a reason why an accused ought not answer to the indictment and ought not be put on trial for the crime alleged", 22 C.J.S. p. 1241. Therefore, it is similar to a motion to quash because of racial discrimination in the jury, a matter which is waived by a valid guilty plea, *Tollett v. Henderson*, 411 U.S. 258 (1973); it is similar to a motion to quash for lack of a speedy trial, also a waivable matter, *Fowler v. United States*, 391 F.2d 276 (5th Cir. 1968); *United States v. Doyle*, 348 F.2d 715 (2d Cir. 1965); and it is similar to a statute of limitations, also waivable, *Forthoffer v. Swope*, 103 F.2d 707 (9th Cir. 1938). As is the case with a violation of these rights, and all other constitutional and nonconstitutional rights, a double jeopardy violation may or may not be oppressive; it may or may not adversely affect the fact-finding process; it may or may not figure in the decision to plead guilty. Similarly, its waiver rests on the same basis as a waiver of all other constitutional rights, *i.e.*, a feeling that the likely results of a contest concerning it will not justify the effort, *McMann v. Richardson, supra*. For these reasons, a defense of double jeopardy is properly held to be waived by a guilty plea.

The leading case on this point is *Brady v. United States*, 24 F.2d 399 (8th Cir. 1928) in which the Court held:

> "The constitutional immunity from second jeopardy is a personal privilege which the accused may waive. (16 case cites omitted). The waiver may be express or implied (4 case cites omitted). Ordinarily the defense must be pleaded specially (5 case cites omitted). Waiver will be implied where the accused pleads not guilty and proceeds to trial, verdict and judgment without raising the defense of former jeopardy (16 case cites omitted). The defense cannot be raised for the first time by motion in arrest of judgment or by motion for a new trial or on appeal (13 case cites omitted)." p. 405.

In accord, *United States v. Hoyland*, 264 F.2d 346 (7th Cir. 1959); *Smith v. United States*, 359 F.2d 481 (8th Cir. 1966); *Kistner v. United States*, 332 F.2d 978 (8th Cir. 1964); *Harris v. United States*, 237 F.2d 274 (8th Cir. 1956); *Berg v. United States*, 176 F.2d 122 (9th Cir. 1949); *Cox v. Kansas*, 456 F.2d 1279 (10th Cir. 1972); *Cox v. Crouse*, 376 F.2d 824 (10th Cir. 1967); *Cabalero v. Hudspeth*, 144 F.2d 545 (10th Cir. 1940); *Curtis v. United States*, 67 F.2d 943 (10th Cir. 1933).

A violation of the right to due process occurring because of a "chilling effect" on the right to trial by a jury is similarly not excepted from the *McMann* holding, *Brady v. United States*, 397 U.S. 743 (1970), *North Carolina v. Alford*, 400 U.S. 25 (1970), *Parker v. North Carolina*, 397 U.S. 790 (1970). Accordingly, the decision below should be reversed.

II.

A VALID WAIVER OF DOUBLE JEOPARDY IS INFERRED DESPITE THE SILENCE OF THE RECORD AS TO IT, PROVIDED THE RECORD MEETS THE STANDARD SET OUT IN *BOYKIN v. ALABAMA*, 395 U.S. 238 (1969)

In deciding that Perry was entitled to relief, the United States District Court held alternatively that the waivable right against double jeopardy "is the type of fundamental right which cannot be waived by mere silence in the record. It goes to the power of the court to try a person". Because nothing appeared in the record on this particular matter, the court held for this reason also that double jeopardy could not be waived. This is incorrect for the constitutional requirement in this regard is not that a particular matter be discussed of record, but only that the record show that an accused has an understanding of what the plea connotes and of its consequences, *Boykin v. Alabama*, 395 U.S. 238 (1969). However, this does not require that he have an understanding of every right waived, *Tollett v. Henderson, supra*; or an understanding of every consequence of his plea, *Redwine v. Zuckert*, 317 F.2d 336 (D.C. Cir. 1963), *Morales - Guarjardo v. United States*, 440 F.2d 775 (5th Cir. 1971), and therefore it should not be required that the record reveal that every right or consequence was explained to him in order to meet the *Boykin* standard.

The transcript of Perry's sworn statements taken prior to the acceptance of his plea (Pet. Cert. pp. 9-10) shows that the requirements of the *Boykin* case were met at Perry's trial. Under oath, he stated he was able to hear and understand the trial judge and was not under the influence of alcohol or drugs. He swore he understood the charge, that it had been explained to him; that he had conferred with his lawyer; that he was ready for trial; and had had time to subpoena his witnesses. He further stated

he knew he could plead not guilty and be tried by a jury, but that he was in fact guilty. Therefore, he pleaded guilty and "freely, understandingly, and voluntarily" instructed his lawyer to plead guilty. He stated that he understood he could be sentenced to as much as 10 years imprisonment. He also testified he was satisfied with his lawyer's services; no one had made any promise or threat to induce his plea; and no one had violated his constitutional rights.

In the event that *Boykin* requirements were not met by the above examination of Perry, however, this did not automatically entitle him to have his sentence vacated because of an alleged violation of a constitutional right. He was still required to prove that his plea was void because it was not in accordance with the *McMann* requirements, *i.e.*, that his plea was not an act "done with sufficient awareness of the relevant circumstances and likely consequences", *Brady v. United States*, 397 U.S. 743 (1970).

Lastly, since the validity of petitioner's plea was not challenged, the *Boykin* requirements are probably not even applicable. Generally, it is held that a defense of double jeopardy must be pleaded, *i.e.*, it is up to the accused to put something in the record concerning it if he desires to preserve the matter for review. Generally, this should be done before a plea to the issue of guilt or innocence, 22 C.J.S. 1242, FRCrP 12(b). This has been described as appropriate by this Honorable Court, *United States v. Murdoch*, 284 U.S. 141 (1931), and is the rule in North Carolina, *State v. Baldwin*, 226 N.C. 295 (1945). For this reason, in addition to the numerous cases previously cited holding that a guilty plea waives a violation of the double jeopardy clause, many cases hold that the defense is waived if not raised during trial, even if the plea is not guilty. *Grogan v. United States*, 394 F.2d 287 (5th Cir. 1967); *United States v. Buonomo*, 441 F.2d 922 (8th Cir. 1971); *Ferini v. United States*, 340

F.2d 837 (8th Cir. 1965); *Brady v. United States*, 24 F.2d 399 (8th Cir. 1928); *Haddad v. United States*, 349 F.2d 511 (9th Cir. 1965); *Levin v. United States*, 5 F.2d 598 (9th Cir. 1925); *Morlan v. United States*, 230 F.2d 30 (10th Cir. 1956); *McKinley v. Hudspeth*, 120 F.2d 523 (10th Cir. 1941); *Curtis v. United States*, 67 F.2d 943 (10th Cir. 1933); *United States v. Scott*, 464 F.2d 832 (D.C. Cir. 1972). As stated in *Haddad v. United States, supra*, at page 514:

> "Formerly, double jeopardy was raised by the plea of autrefois acquit or autrefois convict. Such special pleas have been abolished by Rule 12 of the Federal Rules of Criminal Procedure, but that rule also provides that any defense capable of determination without trial of the general issue may be raised before trial by motion, and that the failure to present it constitutes a waiver of it. The court however may grant relief for cause shown. Not only was there no such motion, but there was no request for relief. *Levin v. United States*, 9th Cir. 1925, 5 F.2d 598, 600 is authority for the proposition that failure to plead former jeopardy constitutes a waiver. The same rule has been applied since the adoption of the Federal Rules of Criminal Procedure, *Harris v. United States*, 8th Cir. 1956, 237 F.2d 274."

Accordingly, nothing else appearing, silence of the record does operate as the waiver of any defense of former jeopardy; and the decision below should be reversed.

CONCLUSION

For the reasons above, the judgments below should be set aside and the case remanded for a dismissal of the claims adjudicated by the courts below, and this is the relief prayed for.

This 28th day of November, 1973.

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Brief for Petitioners by placing three copies in the United States Mail at Raleigh, North Carolina, postage prepaid, addressed to James Keenan of the firm of Keenan, Paul and Rowan at 811 West Main Street in Durham, North Carolina, on the 28th day of November, 1973.

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